No. 84-808

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF NEVADA,
CARSON-TRUCKEE WATER CONSERVANCY DISTRICT
and SIERRA PACIFIC POWER COMPANY, a corporation,
Petitioners,

v.

DONALD P. HODEL, Secretary of the Interior, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF AMICI CURIAE OF THE NATIONAL WATER RESOURCES ASSOCIATION AND THE ASSOCIATION OF CALIFORNIA WATER AGENCIES

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QUESTION PRESENTED

Whether the Secretary of the Interior can foreclose the utilization of water resources under the Endangered Species Act without adhering to the specific procedures and substantive standard that are set forth in the Act.

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INTEREST OF AMICI [1]

The National Water Resources Association (hereinafter, "the National Association") and the Association of California Water Agencies (hereinafter "ACWA") are nonprofit public benefit corporations organized and existing under the laws of the District of Columbia and the State of California, respectively. Members of the National Association include state water associations from the eighteen Western states who have joined together to promote the development, management and wise use of Western water resources. The state member associations include governmental and quasi-governmental units in-

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[1] Pursuant to Sup. Ct. R. 36.1, amici curiae have filed with the Clerk of the Court written consent from the parties to file this brief.

cluding cities, counties, irrigation districts, conservancy districts, and other water management agencies.

ACWA, a member of the National Association, is comprised of a total of 300 California water districts, irrigation districts, county water districts and a number of special purpose agencies, each of which is engaged in the production, transmission, sale, distribution, storage, conservation or reclamation of water in the State of California. ACWA member agencies provide 85 percent of the agricultural, domestic and industrial water delivered in California for the benefit of 21,330,825 persons and 17,343,600 acres of land.

Through its members, the National Association and ACWA are heavily engaged in contracting for water supplies from the federal government for agricultural, municipal and industrial uses. The availability of water and power supplied by the federal government is, therefore, of the utmost importance to the farms, businesses, and residents within the state organizations represented by the National Association and within ACWA's member water districts.

The Ninth Circuit's decision allows federal authorities to prohibit access to these water resources whenever the Secretary of the Interior unilaterally determines that a proposed action might not affirmatively assist the recovery of an endangered or threatened species. This ruling is inconsistent with the language, structure and history of the Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1982) ("ESA"). If allowed to stand, the decision below will severely compromise public access to important water resources by judicially abrogating specific statutory protections that serve the interests of all citizens. As a result, the ability of the National Association, ACWA, and their members to obtain water and power supplied by the federal government will be placed in jeopardy. The National Association and ACWA, therefore, have a vital interest in obtaining Supreme Court review of this case and reversing the decision below.

STATEMENT OF THE CASE

Amici curiae adopt the statement of the case set forth by the petitioners. Because the interests of amici curiae are broader than the specific interests of the petitioners herein, however, a brief restatement of salient facts follows.[2]

The Carson-Truckee Conservancy District and the Sierra Pacific Power Company initiated this case following a refusal by the Secretary of the Interior ("Secretary") to sell water from the Stampede Reservoir for municipal and industrial use. The Secretary based his refusal on his assertion that the removal of any water from the Stampede Reservoir may impede the ability of certain endangered and threatened fish in the Reservoir to recover to historic levels. The Secretary ruled that general provisions included in the Endangered Species Act compelled him to ban any water withdrawals from the Stampede Reservoir once he made a finding that the recovery of fish in the Reservoir might be enhanced if all water supplies were maintained in the Reservoir. The Secretary made such a finding in this case even though he failed to: (1) engage in the consultation process required by the ESA; (2) prepare a biological opinion as required by the statute; (3) evaluate alternative measures that might assist the species, as required by the ESA; or (4) evaluate whether some water could be made available for municipal or industrial use without adversely affecting the species' existence.

The District Court below affirmed the Secretary's decision and entered an order prohibiting the Secretary from making available any water stored in the Stampede Re-

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[2] Petitioners contend, for example, that the Washoe Project Act requires that the Secretary make water supplies from the Stampede Reservoir available to petitioners. Amici curiae support this contention, but amici are most concerned with the Ninth Circuit's far-reaching interpretation of the Endangered Species Act, rather than the relationship between the Endangered Species Act and the Washoe Project Act.

servoir for public use under any conditions "until such time as the cui-ui and Lahontan cutthroat trout are no longer classified as endangered or threatened species or until sufficient water becomes available from other sources to conserve the cui-ui and Lahontan cutthroat trout." Pet. App. 55a.

The Ninth Circuit affirmed. The Court of Appeals ruled that the ESA's general "purpose" and "policy" provisions, which direct the Secretary to use his authority to further the conservation of threatened and endangered species, require the Secretary to take affirmative steps that might assist the recovery of endangered or threatened species. In this case, the court referenced these general provisions and affirmed the District Court's order that the Secretary may not utilize any water from the Stampede Dam until the endangered and threatened species of fish in the Reservoir no longer qualify for protection under the Act. Pet. App. 8a (referring to ESA § 2(b), (c); § 3(3) & § 7(a)(1)).

SUMMARY OF ARGUMENT

In affirming the Secretary's refusal to make water available from the Stampede Reservoir to petitioners, the Ninth Circuit seriously misinterpreted the ESA and established new precedent that threatens access by the National Association, ACWA, and their members to vitally important water resources. Indeed, the precedent set by the Ninth Circuit completely undermines the specific ESA procedural protections that require federal officials to consult with federal wildlife experts, prepare a biological opinion discussing potential impacts that a proposed action may have on endangered or threatened species, and evaluate alternative actions, before deciding whether or not a federal action can or cannot be taken under the ESA. Improperly relying on the ESA's general policy command that the Secretary take steps to assist the recovery of threatened and endangered species, the decision below permits the Secretary, by administrative fiat

and without consultation or scientific study, to close the door on any proposed federal action that would not directly result in the recovery of any endangered or threatspecies * * *.

In addition to reading the ESA's procedural protections out of the statute, the Ninth Circuit's ruling applies a radical new standard for evaluating proposed federal actions under the ESA. Relying again on the ESA's general policy provisions, and ignoring the specific standard established under the ESA for the evaluation of proposed federal actions, the Ninth Circuit's unprecedented reading of the ESA would permit the federal government to reject outright a proposed use of federally-managed resources whenever the Secretary asserts that the proposed action may not enhance the recovery of a threatened or endangered species to its historic status, even though the action may not have any adverse impact on the continued existence of the species. In so doing, the decision below converts the ESA's exhortations that the Secretary take affirmative steps to assist the recovery of species (as, for example, through the implementation of "recovery plans" under Section 4(f) of the Act), into an emasculation of the ESA's specific statutory standard that applies whenever any of the National Association's or ACWA's members request federal action in connection with the utilization of water resources.

ARGUMENT

I. The ESA Establishes Specific Procedures And A Clear Substantive Standard That The Secretary Must Apply When Evaluating The Permissibility Of A Proposed Federal Action Under The Act

Section 7(a)(1) of the ESA includes general language mandating that the Secretary of the Interior carry out his responsibilities in a way that will conserve threatened and endangered species.[3] Consistent with this gen-

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[3] In its entirety, Section 7(a)(1) states:

eral intent, Section 7(a)(2) requires that federal agencies consult with the Secretary to ensure that any proposed "agency action" is not likely to "jeopardize the continued existence" of any endangered or threatened species. The provision states, in part:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any threatened or endangered species * * *.

16 U.S.C. § 1536(a)(2).

The remainder of Section 7 spells out in considerable detail the procedures that federal authorities must follow to assure compliance with this standard. Specifically, once a "prospective permit or license applicant" requests that a federal agency take a particular action (such as the granting of a right-of-way, the release of federally-controlled water, etc.), the federal agency involved "shall consult with the Secretary" to determine whether an endangered or threatened species may be present in the area affected by the proposed action. ESA § 7(a)(3), 16 U.S.C. § 1536(a)(3). Upon an initial finding that an endangered or threatened species might be present in the area, the federal agency involved must undertake formal consultation with the Secretary. Following the consultation, the Secretary must provide the federal agency with a written statement setting forth the Secre-

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> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

16 U.S.C. § 1536(a)(1).

tary's opinion, and "a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat." ESA § 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A). If a potential conflict is found, "the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) of this section and can be taken by the Federal agency or applicant in implementing the agency action." *Id.* That is, the Secretary must propose alternative actions that are "not likely to jeopardize *the continued existence* of any endangered species or threatened species" under Section 7(a)(2) of the Act. ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2) (emphasis added).[4]

The ESA's standard governing the review of proposed federal actions is reiterated in regulations promulgated under the Act by the Department of the Interior. After repeating Section 7(a)(1)'s general policy of encouraging federal authorities to develop affirmative steps to assist endangered and threatened species, the regulations articulate the substantive standard applicable to the review of proposed federal actions, namely, whether the action is likely to "jeopardize the continued existence of a listed species." 50 C.F.R. § 402.01 (1983). The regulations further define the phrase, "jeopardize the continued existence of," by explaining that it covers any activity that:

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[4] If, following consultation under Section 7(a)(2) of the Act, the Secretary concludes that the agency action will not violate the section (that is, if he concludes that the action "is not likely to jeopardize the continued existence" of any threatened or endangered species) or, if the agency "offers reasonable and prudent alternatives which the Secretary believes would not violate" Section 7(a)(2), the Secretary shall provide the federal agency and the applicant with a "written statement" that "specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact." ESA § 7(b)(4), 16 U.S.C. § 1536(b)(4).

> [r]easonably would be expected *to reduce* the reproduction, numbers, or distribution of a listed species *to such an extent as to appreciably reduce the likelihood of the survival and recovery* of that species in the wild.

50 C.F.R. § 402.02 (1983) (emphasis added). That is, an activity does not "jeopardize the continued existence of" a species unless it reduces both the likelihood of survival and the likelihood of recovery of a species. The Secretary of the Interior recently explained this aspect of the Act in connection with a proposal to update the regulations under the ESA. The Secretary noted:

> Actions can adversely affect the recovery of a species but not necessarily affect the species' survival. Thus a no jeopardy opinion would be issued if a given action would not adversely affect the survival of a listed species although it may affect the species' recovery.

48 Fed. Reg. 29,992 (1983).[5]

Application of this substantive standard enables federal authorities to accommodate the need to utilize natural resources with the need, as set forth in the ESA, to protect endangered or threatened species. The ESA's legislative history makes it clear that Congress intended that the statute strike such an accommodation. Following this Court's decision in *TVA* v. *Hill*, 437 U.S. 153 (1978), for example, Congress reexamined the ESA to determine whether Section 7 included enough flexibility to enable the accommodation of demands on natural resources and the needs of endangered and threatened species. Referencing

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[5] Although the current regulations do not leave room for doubt on this issue, proposed new regulations are even clearer. They define "jeopardize the continued existence of" to cover actions "which reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of *both* the survival and recovery of listed species in the wild by reducing the reproduction, numbers, or distribution of a listed species or otherwise adversely affecting the species." 48 Fed. Reg. 29,999 (1983) (emphasis added).

two Court of Appeals cases that authorized specific federal actions despite their obvious impact on certain endangered species, Congress noted that the ESA's standard is not absolute; whether an activity "jeopardizes the continued existence of" a species under Section 7 "depends upon the type and degree of impact that the activity will have on the species or its habitat." [6]

After making this observation, Congress emphasized that Section 7's procedural requirements and the statute's substantive standard are closely interrelated, thereby facilitating the accommodation of resource development and species protection. As Congress explained, proper application of the substantive standard governing proposed federal actions (*viz.*, "is not likely to jeopardize the continued existence of" endangered or threatened species) depends upon careful adherence to the statute's procedural provisions. *See* H.R. Rep. No. 1625, 95th Cong., 2d Sess. 12, *reprinted in* 1978 U.S. Code Cong. & Ad. News 9453, 9462.[7]

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[6] *See* H.R. Rep. No. 1625, 95th Cong., 2d Sess. 10, *reprinted in* 1978 U.S. Code Cong. & Ad. News 9453, 9461:

> Both the Indiana bat and the sandhill crane cases illustrate the fact that there is some degree of flexibility in Section 7. In the sandhill crane case the plaintiffs did not seek, and the Court did not enjoin the completion of the highway despite the fact that it bisected the sandhill crane's habitat. In the Indiana bat case the Court found that the impact of the impoundment of the bats and their habitat was not sufficiently severe to amount to a violation of Section 7. The determination of whether a particular activity violates Section 7 depends on the type and degree of impact that the activity will have on the species or its habitat.

See generally Sierra Club v. *Froehlke*, 534 F.2d 1289 (8th Cir. 1976) (the Indiana bat case); *National Wildlife Federation* v. *Coleman*, 529 F.2d 359 (5th Cir.), *cert. denied sub nom. Boteler* v. *National Wildlife Federation*, 429 U.S. 979 (1976) (the sandhill crane case).

[7] *See also* H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18, *reprinted in* 1978 U.S. Code Cong. & Ad. News 9484, 9486 ("Many, if not most, conflicts between the Endangered Species Act and Federal

In summary, the language, regulations and legislative history of the ESA all confirm that the statute sets forth a finely-tuned regulatory structure that requires federal authorities to follow specific procedural steps in evaluating the impact that a proposed action may have on endangered or threatened species. Once the necessary procedures have been followed, the Act requires federal authorities to apply a substantive standard that examines the impact the action may have on the "existence" or "survival" of the species.

Remarkably, in this case, the Secretary of the Interior failed to follow any of these procedural steps. When evaluating a request for access to Stampede Reservoir water, the Secretary did not engage in consultation, prepare a biological opinion, or evaluate alternative actions. Moreover, in deciding whether or not to proceed with the federal action, the Secretary did not apply the ESA's substantive standard and determine whether making water available to petitioners would be likely "to jeopardize the continued existence of" an endangered or threatened species. In fact, to this date, no jeopardy determination has ever been made.

Instead, the Secretary invoked the ESA's preamble to justify a flat refusal to go forward with the proposed action. As explained below, the ESA's general provisions do not provide a statutory basis for the Secretary to override the ESA's specific procedures and substantive standard in this manner.

II. The ESA's General "Policy" And "Purpose" Provisions Do Not Override The More Specific Procedural Requirements And Substantive Standard That Govern Evaluation Of Proposed Federal Actions

In affirming the District Court's order prohibiting the utilization of Stampede Reservoir water, the Court of

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actions can be resolved by full and good faith consultation between the project agency and the Fish and Wildlife Service or the National Marine Fishery Service, as appropriate").

Appeals relied heavily on the general "purpose" and "policy" provisions of the ESA. *See* ESA § 2(b),(c), 16 U.S.C. § 1531(b),(c); Pet. App. 6a-7a. The court also relied on the introductory language to the Act's consultation provision, Section 7(a)(1), holding that it mandated the Secretary's action, while ruling that the remainder of Section 7, including the specific procedural requirements and substantive standard, had no application to this case. Pet. App. 7a-8a.

The Court of Appeals' heavy reliance on language in the ESA's preamble (Section 2 of the Act) to create new statutory obligations under the Act, at the same time that the court ignored the ESA's specific statutory requirements and substantive standard, constitutes clear error. Sections 2(b) and (c) of the Act, which set forth the "purposes" and "policies" of the ESA in very general terms, do not supercede or otherwise override the specific procedural requirements and substantive standard that apply to the review of proposed federal acts under the ESA.[8] To so find would turn customary principles of statutory construction on their head.[9]

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[8] The preamble calls on all federal agencies "to seek to conserve endangered and threatened species" and "to provide a program for the conservation of such endangered or threatened species." 16 U.S.C. § 1531(b), (c). "Conserve" is broadly defined in Section 3(3) of the Act to include "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary * * *." 16 U.S.C. § 1532(3).

[9] It is a well-established principle of statutory construction that more specific statutory provisions override general provisions. As this Court summarized in *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932):

> General language of a statutory provision, although broad enough to include it, will not be held to apply to a matter specifically dealt with in another part of the same enactment. *United States* v. *Chase*, 135 U.S. 255, 260. Specific terms prevail over the general in the same or another statute which

On the contrary, the general language in the ESA's preamble simply exhorts federal officials to take actions and develop programs that will assist the recovery of listed species. Elsewhere in the Act, the statute provides the Secretary with more precise guidance on how to take affirmative steps to accomplish this goal. Specifically, Section 4(f) of the ESA provides a prescription describing how the Secretary should develop "recovery plans" that will implement his general obligation to conserve endangered species:

> The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans (1) shall, to the maximum extent practicable, give priority to those endangered species or threatened species most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other developmental projects or other forms of economic activity, and (2) may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.

16 U.S.C. § 1533(f).[10] Neither the legislative history of

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otherwise might be controlling. *Kepner* v. *United States*, 195 U.S. 100, 125.

Accord In the Matter of Thornhill Way I, 636 F.2d 1151, 1156 (7th Cir. 1980), *cert. denied sub nom. Mansion House Center South Redevelopment Co.* v. *United States*, 457 U.S. 1117 (1982).

[10] In the legislative history that accompanied the addition of this provision to the ESA in 1978, Congress confirmed that "recovery plans" are intended to provide a framework for assisting in the recovery of endangered and threatened species, thereby implementing an "implicit" requirement in the Act. As the House Report summarized:

Section 4(f) nor the legislative history accompanying the more general "policy" or "purpose" provisions of the Act, however, provides any indication that the provisions somehow enlarge or otherwise change the more specific procedural protections or substantive standard that apply to review of proposed agency actions.[11]

The Ninth Circuit also relies heavily on Section 7(a)(1) of the Act, attempting to bifurcate its general language from the remainder of Section 7's specific implementing provisions.[12] The Court of Appeals treats Sec-

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> The bill adds a new subsection (g) to section 4 which would require the Secretary to develop and implement recovery plans for listed species. *Such plans would be designed to ensure the conservation or survival of each listed species.* Recovery teams may be appointed by the Secretary, where appropriate, to aid in developing or implementing a recovery plan for a particular species. Such plans shall be as long and as detailed as is necessary and consonant with *their purpose of providing a framework for actions directed at conserving or, at least, insuring the survival of the subject species.* Although recovery plans are implicit in the Endangered Species Act, the Act does not specifically mandate recovery plans.

H.R. Rep. No. 1625, 95th Cong., 2d Sess. 19, *reprinted in* 1978 U.S. Code Cong. & Ad. News 9453, 9469 (emphasis added).

[11] The Court of Appeals' reliance on the ESA's preamble (Sections 2(b) & (c)), rather than the specific procedures and standards applicable to proposed federal actions, reflects a fundamental error in statutory construction. As explained in a similar case:

> The EPA argument based on the language in the preamble is based on an erroneous perception of the operation and significance of such language. A preamble no doubt contributes to a general understanding of a statute, but it is not an operable part of the statute and it does not enlarge or confer powers on administrative agencies or officers. Where the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by language in the preamble. The operative provisions of statutes are those which prescribe rights and duties and otherwise declare the legislative will.

Association of American Railroads v. *Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977).

[12] Section 7(a)(1) provides that the Secretary and all federal agencies should further the purposes of the ESA "by carrying

tion 7(a)(1) as though it creates some unspecified duties that stand apart from the subsections that follow. The sole support for this theory is the court's holding that Section 7(a)(2) applies only when the Secretary "has undertaken" a particular project—not when he is considering whether or not to undertake a proposed action. Pet. App. 8a.

Once again, the Ninth Circuit's reasoning cannot withstand scrutiny. Section 7(a)(1) does not stand apart from the substantive standard included in Section 7(a)(2) or the remainder of Section 7. On the contrary, Congress always has joined Sections 7(a)(1) and 7(a)(2). Indeed, the two subsections appeared as a single provision until they were separated in 1979 for administrative convenience.[13] Even when renumbered, Congress

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out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title." 16 U.S.C. § 1536(a)(1). *See* n.3 *supra*.

[13] In connection with the formation of Section 7(a) in 1978, the Conference Report specifically noted that provision simply restated then-existing law:

> The conferees adopted Senate language creating a new section 7(a), which essentially restates section 7 of existing law, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. Conferees did restore a phrase which had been omitted from the Senate language, to clarify that Federal agencies shall consult with the Secretary to ensure that their actions do not adversely impact threatened and endangered species or their critical habitat. The conferees felt that the Senate provision by retaining existing law, was preferable since regulations governing section 7 are now familiar to most Federal agencies and have received substantial judicial interpretation.

H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18, *reprinted in* 1978 U.S. Code Cong. & Ad. News 9484, 9486.

In 1979, Congress split Section 7(a) into two provisions—the current 7(a)(1) and 7(a)(2). Congress made the split for convenience as part of a general renumbering of Section 7. The renumbering of the provision was considered so innocuous that neither the Senate, House nor Conference Reports even mentioned that

made it clear that the renumbering did not change existing law. *See* n.13, *supra*. The then-existing law recognized that Section 7 set forth an integrated consultation requirement, tested by a substantive standard that examined whether a proposed action was likely to jeopardize the continued existence of an endangered or threatened species.[14]

In view of the language of Section 7 and its legislative history, the Ninth Circuit's notion that Section 7(a)(1) applies to this case, while the remainder of the subsection does not, finds no support in the law. The Court of Appeals, however, attempted to justify its bifurcation of Section 7(a)(1) from Section 7(a)(2) by holding that the latter provision only applies after a federal project

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Section 7(a) had been divided into subsections, much less attributed any substantive significance to the administrative change. Instead, in commenting on the meaning of Section 7(a)(1) and (a)(2), Congress referred to the subsections as though they continued to be a single subsection:

> The conference report adopts the language of the House amendment to Section 7(a) pertaining to consultation by Federal agencies with the Fish and Wildlife Service and the National Marine Fishery Service. The amendment, which would require all Federal agencies to ensure that their actions are not likely to jeopardize endangered or threatened species or result in the adverse modification of critical habitat, brings the language of the statute into conformity with existing agency practice, and judicial decisions, such as the opinion in *National Wildlife Federation* v. *Coleman*.

H.R. Conf. Rep. No. 697, 96th Cong., 1st Sess. 12, *reprinted in* 1979 U.S. Code Cong. & Ad. News 2572, 2575-76.

[14] When amending the ESA in 1982, Congress again repeated its own understanding of Section 7 of the Act. As in the past, Congress did not distinguish Section 7(a)(1) from the remainder of the provision. On the contrary, Congress explained that Section 7 established specific procedures (consultation, preparation of a biological opinion, etc.) and applied a substantive standard that examined jeopardy to the "continued existence" of an endangered species. *See* H.R. Rep. No. 567, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2807, 2810.

has been "undertaken." Pet. App. 8a. This "justification" betrays the Court of Appeals' fundamental misreading of Section 7. As explained throughout the provision and its legislative history, Section 7's review procedures are designed to ensure that the Secretary can evaluate a request for federal action *before* it has been undertaken. *E.g.*, ESA § 7(a)(3) ("a Federal agency shall consult with the Secretary *on any prospective agency action* at the request of * * * the prospective permit or license applicant * * *.") 16 U.S.C. § 1536 (a)(3) (emphasis added).[15] The Ninth Circuit cannot brush aside Section 7's procedural protections and its substantive standard simply because a proposed action has not yet been undertaken. This is particularly true when the alleged justification for foregoing the action is based on the ESA.

The seriousness of the Ninth Circuit's error in this case is dramatized by the facts of the case. The action in question here is the contracting for and utilization of water developed at Stampede Dam and Reservoir. A contract for water developed at this federal facility was negotiated between the Carson-Truckee Water Conservancy District and the Bureau of Reclamation, but this contract has never become final because the Secretary has refused to execute it. Refusal to finalize the contract was based upon the Secretary's assertion that the water developed by Stampede Dam and Reservoir was needed for the recovery of the cui-ui fish and the Lahontan cut-

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[15] *See also* H.R. Rep. No. 567, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2807, 2810 ("The assessment of the potential threat of the agency action * * * begins when the agency is advised * * * that an endangered species resides in the area of the *intended project*.") (Emphasis added.) *Accord* H.R. Rep. No. 567, 97th Cong., 2d Sess. 14, *reprinted in* 1982 U.S. Code Cong. & Ad. News 2807, 2814 ("The legislation includes a provision for early consultation during the planning stages of the project and prior to the application for a Federal license or permit, which would signal the prospective applicant when a conflict is likely to arise * * *.").

throat trout. Ostensibly, this determination was made pursuant to the ESA. However, there is no indication that the Secretary's decision was influenced by his implementation of a recovery plan for the cui-ui fish or the Lahontan cutthroat trout under Section 4(f) of the ESA.[16] Nor is this a situation where the Secretary reached his decision following consultation, preparation of a biological opinion and evaluation of alternatives, pursuant to Section 7 of the Act.

Instead, acting in *ad hoc* fashion without regard to the specific statutory requirements, the Secretary ruled (and the courts below ordered) that no water can be made available from the Stampede Reservoir until the cui-ui fish and Lahontan cutthroat trout are no longer endangered or threatened. In so doing, the Court of Appeals has created a dangerous precedent that gives the Secretary plenary authority under the ESA to ban access to water resources, even though the Act's language and intent require the Secretary to follow specific procedures and apply a prescribed statutory standard before approving or rejecting a proposed utilization of federally-controlled resources. As a result, the Circuit Court's decision poses a direct threat to the National Association, ACWA, and their members.

To illustrate, the federal Central Valley Project currently has a surplus of water available for contracting due to a Secretarial moratorium on contracting, imposed because of continuing disputes between the Bureau of Reclamation and the California State Water Resources Control Board. The total surplus available is in excess

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[16] On the contrary, a Cui-ui Recovery Plan that had been developed by the Secretary and approved by the Fish and Wildlife Service in 1978, and which recommended deepening channels in the Reservoir, planting shade trees, and other measures to help the recovery of the cui-ui fish, has never been implemented. If it had been implemented, as required by Section 4(f) of the Act, the recovery of the cui-ui fish would have been enhanced and additional water supplies from the Stampede Reservoir could be made available to petitioners.

of one million acre feet of water per year, far more water than can be developed through the operation of Stampede Dam and Reservoir. The National Association, ACWA, and their members are vitally interested in obtaining access to these waters once the current moratorium is lifted. Application of the Ninth Circuit decision to the California situation, however, would effectively preclude the availability of any of the surplus water upon a mere decision by the Secretary that the water should be used for recovery of certain listed threatened or endangered species. A decision not to contract for in excess of one million acre feet of water annually cannot be based upon such an illusory application of the ESA. Rather, and to the extent that such a decision could ever be justified, it must be based upon the proper application of the various provisions of the ESA, including the detailed procedural provisions and substantive standard found at Sections 4(f) and Section 7 of the Act.

III. The Ninth Circuit's Decision Seriously Misapplied This Court's Decision in *TVA* v. *Hill*

The Ninth Circuit's error is magnified by its serious misapplication of this Court's ruling in *TVA* v. *Hill*, *supra*. In the *TVA* case, the Secretary concluded that construction of the Tellico Dam would jeopardize the very existence of the snail darter. 437 U.S. at 161-62.[17] He reached this conclusion only after carefully following the ESA's procedural steps of consultation and evaluation of alternative actions. 437 U.S. at 162-63. This Court upheld the Secretary's conclusion under Section 7 of the ESA.

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[17] The snail darter lived in that portion of the Little Tennessee River that would be completely inundated by construction of the dam and its related reservoir. As the Secretary summarized: "The proposed impoundment of water behind the proposed Tellico Dam would result in total destruction of the snail darter's habitat." 437 U.S. at 162.

In this case, the Secretary concluded that retaining all water in the Stampede Reservoir may enhance the recovery of two fish species in the reservoir. Unlike *TVA*, however, the Secretary did not decide whether making water available from the Stampede Dam would adversely affect the existence of the fish in the Reservoir. Also, in contrast to the procedures followed in the *TVA* case, the Secretary reached his "finding" without following the procedural steps of consultation, biological analysis, and evaluation of alternatives.[18]

Thus, in *TVA* v. *Hill*, this Court affirmed a straightforward application of the ESA after the Secretary had followed the ESA's procedures and applied the Act's substantive standard, concluding that construction of the Tellico Dam would jeopardize the existence of the snail darter. Misapplying the same precedent to much different circumstances,[19] the Court of Appeals affirmed the Secretary's decision to withhold water from the Stampede Dam even though the Secretary failed to follow ESA procedures and failed to apply the Act's substantive standard. If allowed to stand, the Ninth Circuit's decision permits the federal government to halt construction of a dam. refuse to make water available to needy municipalities or other water users, or otherwise deny access to important natural resources, based on the Secretary's untested assertion that a requested use of natural resources might not create conditions optimum to the restortation of a particular threatened or endangered species, even though there has been no finding that the proposed action would adversely affect the continued health of the species. The Ninth Circuit's decision is plainly at odds with both the ESA and this Court's prior interpretation of the statute.

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[18] The ESA was amended in 1978 and 1979, following the *TVA* decision, to spell out in even greater detail the procedural steps that the Secretary must follow when evaluating the permissibility of a proposed action under the ESA.

[19] *See* Pet. App. 7a-8a.

CONCLUSION

Because the Ninth Circuit's decision seriously misinterprets the ESA and prior decisions of this Court, to the detriment of the National Association, ACWA, their members, and all citizens, amici curiae respectfully request that the Court issue a writ of certiorari and reverse the decision below.

Respectfully submitted,

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